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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1213

ROY E. AMMOND,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
and
H. F. EMERSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved

This case involves several questions:

(1) Is a federal district court bound by the construction of a state statute by a court of original jurisdiction of the same state, in the absence of an interpretation by any other court of the state, for the purpose of determining whether a controversy is separable?

(2) May a federal district court enjoin the enforcement of a judgment rendered in the state court?

This suit originated by the filing by the present petitioner of an action in tort for personal injuries sustained as a result of alleged negligent conduct of the respondents in the Court of Common Pleas of Stark County, Ohio. (R. 3) The Respondents were sued jointly as joint tort feasors. Respondents filed a Petition for Removal to the District Court for the Northern District of Ohio, Eastern Division. (R. 9) Said Petition for Removal was denied (R. 12), the Common Pleas Court construing Section 8856, Ohio General Code, (Appendix 1) as permitting respondents to be sued jointly, and respondent, H. F. Emerson, being a citizen of Ohio, there was no separable controversy wholly between citizens of different states.

Thereupon, respondents filed certified copies of all the pleadings and order overruling the Petition for Removal, in the District Court. Petitioner duly filed a motion to remand in the District Court. (R. 19) Said motion to remand was denied. (R. 20) The state court proceeded to give judgment in favor of Petitioner (R. 60), from which no appeal was taken. Prior to the entry of said judgment in the state court, respondents filed on ancillary complaint in the District Court (R. 20) asking that the present petitioner be enjoined from proceeding in the state court on his motion for judgment. After the state court entered judgment, respondents filed a supplemental ancillary complaint, asking that the present petitioner be enjoined from enforcing the state court judgment (R. 26), and such an order was entered July 10, 1940 (R. 33).

Notice of appeal to the Circuit Court of Appeals for the Sixth Circuit was duly filed (R. 61). The cause was argued and submitted December 11, 1941, and on February 10, 1942, the Court of Appeals affirmed the decree of the District Court.

This is a petition for writ of certiorari to review the decree of the Circuit Court of Appeals for the Sixth Circuit.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

Aside from the importance of the question herein involved as affecting state courts and their power to construe their own statutes, we submit that the decrees of the District Court for the Northern District of Ohio, and of the Circuit Court of Appeals for the Sixth Circuit were clearly erroneous and not in accord with the applicable decisions of this Court.

Insofar as the decrees below sustain the position that the District Court was correct in assuming jurisdiction of this cause, they are not in accord with the following cases, among others:

Chgo., R. I. & Pac. R. Co. v. *Schwyhart,* 227 U. S. 184;
Alabama Great Southern R. Co. v. *Thompson,* 200 U. S. 206;
West v. *A. T. & T. Co.,* 311 U. S. 223;
MacGregor v. *State Mutual Life Assurance Co.,* decided February 16, 1942, 86 L. Ed. 559;
Fidelity Union Trust Co. v. *Field,* 311 U. S. 169.

Insofar as the decrees of the Courts below sustain the power of the District Court to enjoin Petitioner from enforcing the judgment of the state court, they are not in accord with:

Metropolitan Casualty Co. v. *Stevens,* 312 U. S. 563;
Chesapeake & Ohio Railway Co. v. *White, Admr.,* 111 U. S. 134.

In the interest of brevity (Rule 38, Par. 2), Petitioner does not at this time set forth all of the points which will

be urged at the argument on the merits of this cause, should the writ be granted, nor all of the contentions in support of such points, but Petitioner here refers to and incorporates into this petition all of the matters presented in its assignments of errors contained in the supporting brief filed herewith, as if fully set out herein.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a transcript of the record, and proceedings, herein; and that the decree of the United States Circuit Court of Appeals for the Sixth Circuit be reversed, and the decree of the District Court for the Northern District of Ohio be reversed, by this Honorable Court, and for such other relief as to this Honorable Court may seem just and proper.

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APPENDIX

Section 8856, General Code of Ohio:

"LIABILITY OF COMPANY. The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person."

IN THE

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H. F. EMERSON,
Respondents.

BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT OF FACTS

The Petitioner's cause of action arose by reason of the fact that the automobile in which he was riding as a passenger on the 25th day of May, 1938, was struck by a train of The Pennsylvania Railroad Company, which train was being operated by H. F. Emerson, the engineer, a resident of Ohio.

This crossing accident occurred in Stark County, Ohio, and as a result of the injuries which the Petitioner received, he filed an action against The Pennsylvania Railroad Company and H. F. Emerson, the engineer, as joint tort feasors by reason of and under authority of General

Code, Section 8856, of the statutes of the State of Ohio, which reads as follows:

> "LIABILITY OF COMPANY. The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person."

The action of the Petitioner seeking judgment against the Respondents for personal injuries was filed by said Petitioner, a citizen of Ohio, in the Common Pleas Court of Stark County, Ohio on March 24, 1939; service was made upon both The Pennsylvania Railroad Company, a citizen of the State of Pennsylvania, and H. F. Emerson, a citizen of the State of Ohio; service of process being made under the jurisdiction of the Common Pleas Court of Stark County, Ohio.

Thereafter and before answer day, and within the time required by law, The Pennsylvania Railroad Company, on April 19, 1939, filed a petition for removal, together with a bond for removal, in the Common Pleas Court of Stark County, Ohio, alleging improper joinder of parties defendant; said petition for removal came on for hearing before one of the judges of the Common Pleas Court of Stark County, Ohio; and, after a hearing in open court on April 21, 1939, said petition for removal from the Common Pleas Court of Stark County, Ohio, to the United States District Court for the Northern District of Ohio, Eastern Division, was denied; the Court of Common Pleas of Stark County, Ohio, held that it had jurisdiction of the parties and subject matter and refused to surrender its jurisdiction.

Immediately thereafter counsel for the Respondents procured certified copies of all the pleadings of the cause of action then pending in the Common Pleas Court of Stark County, Ohio, together with the order of the Common Pleas Court refusing to surrender jurisdiction, and filed all of said papers in the Clerk's Office of the United States District Court at Cleveland, Ohio.

Notice of this attempted removal by the Respondents was served upon Petitioner's counsel, and thereupon Petitioner filed a motion to remand, together with a brief in support thereof, with the Federal District Court at Cleveland, Ohio, which motion to remand was overruled on September 21, 1939, by the Federal District Court which claimed that it had jurisdiction of the subject matter and parties.

The cause of action pending in the Common Pleas Court of Stark County, Ohio, with the original papers thereto, was assigned for trial on the 19th day of March, 1940, and both Petitioner's and Respondents' counsel received notice of the assignment of said case for trial, ten days prior to the date set for hearing.

On the 19th day of March, 1940, the Respondents and their counsel failed and refused to appear for trial in the Common Pleas Court of Stark County and the trial proceeded to a determination before a Court and Jury, and at the conclusion of the evidence and the charge of the Court, the jury after deliberation returned a verdict for Petitioner.

On March 23rd, 1940, no motion for a new trial having been filed by the Respondents, the Clerk of Courts of Stark County entered the judgment for Petitioner on the verdict as required by law.

Thereafter, on April 16th, 1940, the Petitioner caused an execution to be issued on said judgment, directed to the Sheriff of Stark County, Ohio, for the purpose of the enforcement and collection of the judgment recovered by the Petitioner against the Respondents in the cause of action in the Common Pleas Court of Stark County, Ohio.

After the writ of execution had been delivered by the Clerk of Courts to the Sheriff of Stark County, Ohio, the Respondents filed a motion on May 2nd, 1940, in the said Federal District Court of Cleveland, Ohio, based upon a supplemental complaint, asking the Federal District Court for an order directed to Petitioner to show cause on May 10th, 1940, why said Petitioner should not be enjoined from proceeding by execution or otherwise to collect said Petitioner's judgment from the Respondents.

After a hearing in open court on May 10th, 1940, the Federal District Court enjoined Petitioner and Petitioner's counsel from proceeding by execution or otherwise to collect the judgment which said Petitioner had recovered in the Common Pleas Court of Stark County, Ohio. This order of the Federal District Court was Journalized and filed on July 10th, 1940.

On September 12, 1940, Petitioner filed a Notice of Appeal to the Circuit Court of Appeals for the Sixth Circuit, together with a Statement of Points to be Relied Upon and the Designation of Contents of Record on Appeal. Thereafter and following the filing of briefs, the cause was argued and submitted on December 11, 1941.

The Circuit Court of Appeals for the Sixth Circuit, on February 10, 1942, entered its decree affirming the decree previously entered by the District Court of the United States for the Northern District of Ohio.

Petitioner's contentions based upon the foregoing statement of facts, are:

(1) That the District Court was in error in assuming jurisdiction over the cause and in overruling Petitioner's Motion to Remand, because the State Court held there was not a separable controversy between citizens of different states, and the District Court was bound by such holding;

(2) That the District Court erred in enjoining Petitioner from proceeding to enforce his judgment rendered in the State Court, because the District Court was without power to do so; and

(3) That the Circuit Court of Appeals erred in affirming the decree of the District Court.

ASSIGNMENTS OF ERROR

I. The District Court erred in assuming jurisdiction over the cause and in overruling Petitioner's Motion to Remand, because the State Court held there was not a separable controversy and the District Court was bound by such holding.

II. The District Court erred in enjoining Petitioner from proceeding to enforce his judgment rendered in the State Court, because the District Court was without power to do so.

III. The Circuit Court of Appeals erred in affirming the decree entered by the District Court.

ARGUMENT

Assignment of Error No. I.

The Federal Statute involved in the first assignment of error is Section 28 of the Judicial Code (28 U. S. C., Sec. 71), and the part involved herein is as follows:

"Removal of Suits from State Courts. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given jurisdiction by Part I of this title, in any State Court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, by Part I of this title, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between, them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district." Etc.

The Statutes of the State of Ohio involved in this question are General Code, Sections 8853 and 8856, which read as follows:

Sec. 8853. "Signals at Railroad Crossings. Every company shall attach to each locomotive engine passing upon its road, a bell of the ordinary size in use on such engines, and a steam whistle. When an engine in motion and approaching a turnpike, highway or town road crossing or private crossing where the view of such crossing is obstructed by embankment, trees, curve or other obstruction to view, upon the same line therewith, and in like manner where the road crosses any other traveled place, by bridge or otherwise, the engineer or person in charge thereof, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from

such crossing, and ring such bell continuously until the engine passes the crossing."

Sec. 8856. "LIABILITY OF COMPANY. The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person."

From the petition filed in the State Court (R. p. 2, 3), it appears that the Respondent, The Pennsylvania Railroad Company, is for purpose of diversity of citizenship, a citizen of the Commonwealth of Pennsylvania, and the Respondent, H. F. Emerson, the engineer of the train involved in the collision, is a citizen of the State of Ohio. The petition charged both Respondents with failure to obey the Statutes of Ohio, and more particularly Section 8853 of the Ohio General Code, in connection with the duty imposed as to bell and whistle signals required to be given at a crossing.

The theory that Petitioner proceeded upon in the State Court was that Section 8856 of the Ohio General Code authorized, in a negligence action, the joinder of the railroad company and the engineer as parties defendant. If petitioner's theory was correct—and the State Court so held—the railroad company and the engineer were joint tort feasors and there was no separable controversy "wholly between citizens of different states" as required by Section 28 of the Judicial Code as a prerequisite to the right of removal to the District Court.

In order to justify removal of a cause from a State Court to the District Court on the ground of a separate controversy between citizens of different states, the whole subject matter of the suit must be capable of being fully

determined as between them, and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit.

Hyde v. *Ruble,* 104 U. S. 407;
Winchester v. *Loud,* 108 U. S. 130;
Brown v. *Trousdale,* 138 U. S. 389;
Torrence v. *Shed,* 144 U. S. 527;
Roberts v. *Underwood T. Co.,* (D. C.—N. J.), 257 Fed. 583.

If the Petitioner's theory was correct—and the State Court so held—neither the motive of Petitioner in joining the railroad company and the engineer as parties defendant, nor his purpose in so doing can be questioned. The choice of whether to sue one or both would lie entirely within the prerogative of Petitioner. This has been determined and stated many times.

Cincinnati, New Orleans and Texas Pacific Railroad Company v. *George Bohon, Admr. of Edward Cook, Dec'd and Fred Milligan,* 200 U. S. 221;
Alabama Great Southern Railway Co. v. *H. C. Thompson, Admr. of Florence James, Dec'd,* 200 U. S. 206;
Chesapeake and Ohio Ry. Co. v. *Cockrell, Admr.,* 232 U. S. 146;
Southern Ry. Co. et al. v. *Miller,* 217 U. S. 209;
Ill. Central R. R. Co. v. *Sheegog,* 215 U. S. 316;
Chicago, R. I. & P. R. Co. v. *Whiteaker,* 239 U. S. 421.

The mere epithet of fraudulent joinder of Respondents contained in the Petition to Remove, filed by Respondents, does not create a case of fraudulent joinder. *Chesapeake & Ohio Railway Co.* v. *Cockrell, Admr.,* 232 U. S. 146, Syllabus 2:

"The right of a non-resident defendant to remove the case cannot be defeated by the fraudulent joinder

> of a resident defendant; but the defendant seeking removal must allege facts which compel the conclusion that the joinder is fraudulent; merely to apply the term 'fraudulent' to the joinder is not sufficient to require the state court to surrender its jurisdiction."

If Petitioner had the right to join Respondents, the fact that he did so could not be fraudulent merely because the non-resident defendant would thereby be prevented from removing the case from the State Court to the District Court.

THE STATE COURT PROPERLY DENIED RESPONDENTS' PETITION TO REMOVE

The question before the State Court was whether, on the face of the record, a case for removal had been made. Until Respondents could make a showing on the face of the record that there was a proper case for removal, it was the duty of the State Court to proceed with the cause. See *Stone* v. *South Car.*, 117 U. S. 430, Syllabus 1:

> "A state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which, on its face, shows that the petitioner has a right to the transfer; and if it decides against the removal and proceeds with the cause, its ruling is reviewable here after final judgment."

A further statement can be found in *Madisonville Traction Company* v. *St. Bernard Min. Co.*, 196 U. S. 239, at page 245, wherein this court said:

> "It is well settled that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the State Court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made."

The State Court was thus met at the outset with the problem of determining whether there was, as a matter of law, such a separable controversy as to give Respondents the right of removal. Separability of controversies is governed by state law. *Alabama Great Southern R. Co.* v. *Thompson,* 200 U. S. 206; *Chicago, R. I. & Pacific R. Co.* v. *Schwyhart,* 227 U. S. 184.

The Court of Common Pleas of Stark County, Ohio, in denying the petition for removal, filed by the Respondent, The Pennsylvania Railroad Company, relied upon Section 8856 of the Ohio General Code. The State Court, by denying the petition for removal, held that Respondents were joint tort feasors, and since the Respondent, H. F. Emerson, was a citizen of Ohio, there was not a separable controversy wholly between citizens of different states.

This interpretation of the Ohio statute by the Court of Common Pleas of Stark County, Ohio, is the first interpretation such statute has received. There are two reported cases decided by the Supreme Court of Ohio, dealing with the joinability of masters and servants in general. They are *Clark* v. *Fry,* 8 O. S. 358, and *French, Admr.* v. *Construction Company,* 76 O. S. 509.

The rule announced by these two cases is that a master and servant cannot be sued jointly. But neither case was a railroad case. In neither case was Section 8856, Ohio General Code, discussed. The reason for this should be obvious. There would be no occasion to interpret such section because in neither case was a railroad involved and thus in neither case would the statute apply, also both cases were decided prior to the enactment of Section 8856.

Here then, is the first and only interpretation by an

Ohio State Court of an Ohio statute and we submit that the District Court was bound by such interpretation. *West* v. *A. T. & T. Co.,* 311 U. S. 223. And see *MacGregor* v. *State Mutual L. Assur. Co.,* decided February 16, 1942, 86 Law. Ed. 559. "Where the applicable rule of decision is the state law, the duty of the federal court is to ascertain and apply that law even though it has not been expounded by the highest court of the state." *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, Syllabus 1.

There have been two federal cases originating in Ohio, both of which involved railroads, holding that the railroad and the servant could not be sued jointly. *Robbins* v. *Penna. R. Co.,* 245 Fed. 435 (C. C. A. 6th); *Galehouse* v. *B. & O. R. Co.,* 274 Fed. 370 (D. C. Ohio).

It is submitted, however, that these cases were erroneously decided because both followed *Clark* v. *Fry,* and *French, Admr.* v. *Construction Company,* both supra. As pointed out above, neither of these two latter cases was a railroad case, and in neither was Section 8856 discussed.

Furthermore, under the *West case,* supra, the District Court was bound to follow the State Court's interpretation notwithstanding the fact that to do so would involve a departure from prior decisions of federal courts.

Syllabus 2 of the West case, supra, is as follows:

> "A rule announced and applied by state courts as the law of the State, though not passed on by the highest state court, may not be rejected by a federal court because it thinks that the rule is unsound in principle or that another is preferable."

Syllabus 3 of the West case, supra, is as follows:

> "In deciding local questions it is the duty of the federal court to ascertain from all available data

> what the state law is, and apply it, however superior a different rule may appear from the viewpoint of general law and however much the state rule may have departed from prior decisions of the federal courts."

It is submitted, therefore, that the District Court was bound by the interpretation of the statute as determined by the state court, and that it erred in assuming jurisdiction of the cause and in overruling Petitioner's motion to remand.

Assignment of Error No. II.

THE DISTRICT COURT ERRED IN ENJOINING PETITIONER FROM PROCEEDING TO ENFORCE HIS JUDGMENT RENDERED IN THE STATE COURT BECAUSE THE DISTRICT COURT WAS WITHOUT POWER TO DO SO.

The federal statute involved in this assignment of error is Section 265 of the Judicial Code (28 U. S. C. 379), which provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

If the Petitioner's theory concerning the joinability of the Respondents was correct, then, of course, it is clear that the District Court had no injunctive power. But assuming for purpose of argument, that the District Court was not bound by the Ohio State Court's interpretation of the Ohio Statute, we submit that even under those circumstances the Respondents were not entitled to injunctive relief. Their remedy was by way of appeal through the State Courts.

This Court recently reviewed the question of removability in *Metropolitan Casualty Co.* v. *Stevens,* 312 U. S. 563. At page 567 the Court says:

> "When a petition for removal to a federal court is denied by the State Court, the petitioner may do one of three things. He may object to the ruling, save an exception, and litigate the cause in the state courts. (Citing cases.) He may remove the suit to the federal court despite the ruling of the state court. (Citing cases.) He may proceed in both courts at the same time. (Citing cases.)"

If Respondents, under the assumed statement of facts, could get injunctive relief, such procedure would mean that a petitioner could do one of *four* things, instead of *three,* as outlined in the *Stevens Case,* supra. In addition such procedure would be in the teeth of Section 265 of the Judicial Code, supra. Petitioner is, of course, cognizant of the cases beginning with *French* v. *Hay,* 22 Wall. 250. We would, however, like to call the Court's attention to *Chesapeake and Ohio Railway Co.* v. *A. E. White, Admr.,* 111 U. S. 134, wherein the syllabus is as follows:

> "When a cause is properly removed from a State Court to a Federal Court, and the State Court nevertheless proceeds with the case, and forces to trial the party on whose petition the removal was made, the proper remedy is by writ of error after final judgment, and not by prohibition or punishment for contempt."

So far as Petitioner can determine, this case has never been overruled, unless it may be said to be overruled as a necessary inference by *Madisonville Traction Co.* v. *St. Bernard Min. Co.,* 196 U. S. 239.

We urge that the *Stevens Case,* supra, is the most re-

cent pronouncement by this Court, and in view thereof, the dictum contained in *Samuel R. Toucey* v. *New York Life Ins. Co.*, decided November 17, 1941, cannot be controlling.

For the foregoing reasons, we submit that the remedy of Respondents was by way of appeal in the State Courts. Such a course would adequately protect their rights.

Assignment of Error No. III.

THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE ENTERED BY THE DISTRICT COURT.

The arguments advanced under the first and second assignments of error are the same arguments in support of this third assignment of error, and will not be repeated. But for the same reasons therein advanced, we submit that the Circuit Court of Appeals erred in affirming the decree of the District Court and that therefore this Court should grant a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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MAY 13 1942
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PENNSYLVANIA RAILROAD COMPANY IN OPPOSITION.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1213.

ROY E. AMMOND,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY
and
H. F. EMERSON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PENNSYLVANIA RAILROAD COMPANY IN OPPOSITION.

OPINIONS BELOW.

The district court did not render a written opinion. Its judgment is copied in the record at page 33. The opinion of the Circuit Court of Appeals (R. 68-75) is reported in 125 F. (2d) 747.

JURISDICTION.

The judgment of the court below was entered on February 10, 1942 (R. 67). The petition for writ of certiorari was filed May 4, 1942. Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended. 28 U. S. C. § 347(a).

QUESTION PRESENTED.

May a Federal District Court enjoin the enforcement of a default judgment rendered in a state court after removal had been perfected and jurisdiction had been assumed by denial of a motion to remand, and while an ancillary petition to enjoin proceedings in the state court and an answer thereto were pending in the District Court?

STATUTES INVOLVED.

The statutes are printed in the appendix.

STATEMENT.

Petitioner, a resident of Ohio, commenced this suit against respondents, a Pennsylvania corporation and a resident of Ohio, in the Court of Common Pleas of Stark County, Ohio, on March 24, 1939. The complaint alleged that owing to the negligence of the respondents, petitioner had suffered injuries in a collision between an automobile in which he was riding as a passenger and a train of respondent railroad company which was in the control of its engineer, respondent Emerson (R. 3-7). On April 19, 1939, respondent railroad company filed in the Court of Common Pleas of Stark County a petition and bond for removal to the proper federal district court, alleging in substance that it was a non-resident and that a separable controversy was involved as to it (R. 9-12). Two days later the petition for removal was denied (R. 12). Respondent railroad company thereupon removed the cause to the proper federal district court, and on May 4, 1939 filed its answer to the complaint (R. 14-16). Neither respondent appeared or pleaded in the state court. Petitioner moved to remand the cause to the state court (R. 19). The motion was denied on September 21, 1939 (R. 20).

On October 27, 1939, more than a month after the motion to remand was denied, petitioner filed in the state court a motion for judgment (R. 60). On November 15, 1939,

respondent railroad company filed in the district court an ancillary complaint in which it prayed that an injunction issue restraining petitioner from proceeding in the state court (R. 20-23). Petitioner filed an answer to the ancillary complaint (R. 24-26) and two months later, on January 23, 1940, a demand for a jury trial in the district court (R. 36).

On March 19, 1940, six months after petitioner's motion to remand had been denied and at a time when both the principal and the ancillary causes were at issue in the federal district court, petitioner, in an ex parte hearing in the state court, took a verdict of a jury for $35,000, the amount prayed in the complaint (R. 60). Four days later judgment was entered on the verdict (R. 60). It was conceded in the court below that at the time judgment was entered, the state court had no knowledge of the orders or rulings of the federal district court (R. 69). Execution issued on the judgment on April 16, 1940 (R. 36, 60) and six days later respondent railroad company filed a supplement to the ancillary complaint to enjoin its enforcement (R. 26-27). An order to show cause issued on May 2, 1940 (R. 32) and on July 10, 1940, after the hearing set forth in the record at pages 38-58, the federal district court issued an injunction restraining further proceedings in the state court (R. 33-34).

From the order granting this injunction petitioner appealed and on February 10, 1942, the judgment of the district court was unanimously affirmed (R. 67). The petition for certiorari is addressed only to this judgment.

ARGUMENT.

The only question is whether the district court properly enjoined enforcement of the state court judgment which was rendered after the cause had been removed to the district court and that court had denied a motion to remand and had assumed jurisdiction. Petitioner attacked

the injunction on the single ground that the district court was without jurisdiction of the principal case because an Ohio statute, claimed to have been construed by the Common Pleas Court of Stark County at the time it denied removal, established joint liability of the respondents and therefore negatived the existence of a separable controversy between petitioner and respondent railroad company. Apart from the fact that the state court did not construe the statute as petitioner claims, there are at least four reasons why the contention is unsound.

1. Under Ohio law a master and servant may not be joined in the same action where the liability of the former rests on the principle of *respondeat superior*. *Clark v. Fry*, 8 O. S. 358, 377; *French v. Central Construction Co.*, 76 O. S. 509, 518; *Losito v. Kruse*, 136 O. S. 183, 187; *Herron v. Youngstown*, 136 O. S. 190, 196. That has been the unvarying rule in Ohio since 1858 (*Clark v. Fry, supra*), and as recently as 1940 the Ohio Supreme Court stated in *Losito v. Kruse* that in such cases "there can be no joinder in a single action of the party primarily liable and the party secondarily liable because there is no joint liability. If they are joined in an action and this relationship appears on the face of the petition, it is demurrable for misjoinder of parties defendant" (p. 187). The rule thus stated by the Ohio Supreme Court is followed in Ohio cases by the federal courts of the Sixth Circuit. *Galehouse v. Baltimore & Ohio R. Co.*, 274 Fed. 370; *Robbins v. Pennsylvania Co.*, 245 Fed. 435.

Section 8856[1] of the Ohio General Code does not make the rule inapplicable here. All of the decisions cited above and in the petition have regarded the rule as applicable

[1] Sec. 8856. Liability of company. The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person.

generally in cases involving the liability of master and servant and none has excepted the case where the liability of a railroad company and its engineer is concerned. Indeed, the *Robbins* and *Galehouse* decisions are applications of the rule to cases involving that precise situation and the opinions represent interpretations "placed upon purely local law by an (Ohio) federal judge of long experience and by three circuit judges whose circuit includes (Ohio)." *MacGregor v. State Mutual Life Assurance Co.*, No. 179 decided February 16, 1942. Moreover, neither opinion even mentions the section although it had then been in force for many years.

Section 8856 does not state that the railroad company and the engineer shall be "jointly liable." When the legislature has intended that result it has expressly provided for it,[2] just as it has expressly provided for procedural joinders in another part of the code. § 11255. The section must be examined in connection with Sections 8853 and 8855. Such an examination discloses that Sections 8853 and 8855 were intended to impose certain duties and a penalty on engineers who were employees of railroad companies, and that Section 8856 was added to forestall the contention that by implication the engineer and the employer railroad company were therefore not liable in damages. The choice of the phrase—"the company • • • as well as the person himself, shall be liable in damages"—is ample evidence that that section was not intended to have any other effect.

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[2] Proof that the legislature knew how to draw a section providing for joint liability is Section 8814. It reads: "Notwithstanding such lease the corporation of this state lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee *shall be jointly liable* upon all rights of action accruing to any person for negligence or default growing out of the operation and maintenance of such railroad, or in any wise connected therewith, and may be jointly sued in the courts of this state of proper jurisdiction, and prosecuted to final judgment therein as in other cases of joint liability. Service may be had upon such companies, or either of them by the service of process upon any officer or agent of either of the companies." (Emphasis added.)

Sections 8853 and 8856 were enacted in 1872 (69 O. L. 49; Rev. Stat. §§ 3336, 3337) and so far as relevant here have remained unchanged since that date. Undoubtedly there have been many cases involving the liability of a railroad company and its engineer under Sections 8853, 8855 and 8856 since they were first enacted, but petitioner concedes (Br. 14) that Section 8856 has never been construed at all, much less construed to exclude such cases from the rule in respect of joinder announced in *Clark v. Fry*, 8 O. S. 358. In fact, so far as reported cases and the recollection of counsel extend, no one has ever advanced such a contention until petitioner pressed it here.

2. The order denying removal entered by the Court of Common Pleas of Stark County (R. 12) cannot be regarded as authority for petitioner's construction of Section 8856. Nor can it be regarded, despite contrary assertions in the petition, as a decision construing a state statute which a federal court would be bound to follow under the principles of *Swift v. Tyson*, 16 Pet. 1; *Erie R. Co. v. Tompkins*, 304 U. S. 64; and *West v. A. T. & T. Co.*, 311 U. S. 223. That order recited merely that "said petition is denied" (R. 12). The state court did not file an opinion and nothing in the record indicates the reason for the state court's decision. From all that appears, removal may have been refused on the theory that the removal statute (28 U. S. C. § 71) was unconstitutional.

3. The decision by the court below was not in conflict with *Metropolitan Casualty Insurance Co. v. Stevens*, 312 U. S. 563, or *Yankaus v. Feltenstein*, 244 U. S. 127. In neither of those cases did the federal district court assume jurisdiction, but rather both *granted* the motion to remand. This Court necessarily regarded the causes as improperly removed since judicial review of the remand order was precluded by Section 28 of the Judicial Code. See *Kloeb v. Armour & Co.*, 311 U. S. 199; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374. In that view of

the cases, it followed that the state courts had jurisdiction to enter default judgments. Here the district court *denied* the motion to remand and assumed jurisdiction. For reasons already stated, it is apparent that there was a separable controversy and therefore that the action of the district court was proper. It follows that the state court was without jurisdiction to enter the default judgment which petitioner subsequently obtained.[3] *Iowa Central Ry. Co. v. Bacon*, 236 U. S. 305; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239; *Virginia v. Rives*, 100 U. S. 313; *Gordon v. Longest*, 16 Pet. 97. It is reasonable to suppose that the judgment would never have been entered had petitioner remedied the court's conceded (R. 69) lack of information concerning the rulings of the federal court.

4. The injunction restraining enforcement of the state court judgment was an appropriate and authorized method of protecting respondents and the jurisdiction of the district court. *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239; *Dietzsch v. Huidekoper*, 103 U. S. 494. Its issuance was not prohibited by Section 265 of the Judicial Code (*Dietzsch v. Huidekoper, supra*), and during this Term this Court has expressly recognized the propriety of such an injunction. *Toucey v. New York Life Insurance Co.*, 314 U. S. 118, 133.

5. In any event, and apart from the arguments previously advanced, the judgment of the court below must be affirmed. The propriety of the injunction, the only subject of dispute on this petition, does not depend on the existence or non-existence of jurisdiction of the cause which was removed. *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207; *United States v. Shipp*, 203 U. S. 563; *In re Metropolitan Trust Co.*, 218 U. S. 312; *Holm v. Hickory Cane Mining Co.*, 36 F. Supp. 441; *Webb v. Southern Ry.*

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[3] If the necessary papers and a proper petition and bond for removal are filed, "it shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit." Judicial Code § 29; 28 U. S. C. § 72.

Co., 235 Fed. 578; *Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718; *McAlister v. Chesapeake & Ohio Ry. Co.*, 157 Fed. 740. The district court necessarily had power to determine whether or not it had jurisdiction[4] (*Chesapeake & Ohio Ry. Co. v. McCabe, supra; United States v. Shipp, supra; In re Metropolitan Trust Co., supra*) and once it had done so it was authorized to prevent petitioner from flouting that determination and compelling respondents to conduct the litigation on two fronts. Any other conclusion would make it impossible for removing defendants to rely upon a federal court's acceptance of jurisdiction and would encourage in plaintiffs an unwholesome disregard for its orders.

CONCLUSION.

Under the law of Ohio respondents were not jointly liable and there was therefore a separable controversy between petitioner and respondent railroad company which was properly removed to the district court. Section 8856 of the Ohio General Code does not affect that conclusion. Apart from these considerations the injunction was proper in any event since its propriety does not hinge on jurisdiction of the principal cause. The decision below is not in conflict with decisions of this Court or of other federal courts, and the questions presented, even if important, were plainly decided correctly. Accordingly, the petition should be denied.

Respectfully submitted,

CLAN CRAWFORD,
RUSSELL J. BURT,
Counsel for The Pennsylvania Railroad Company.

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[4] "It is not necessary to determine whether the case was removable or not. The Federal court was given jurisdiction to determine that question, it did determine it, and its judgment was conclusive upon the parties before it, until reversed by a proper proceeding in this court." *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 222.

APPENDIX.

Sec. 8853. Signals at railroad crossings.

Every company shall attach to each locomotive engine passing upon its road, a bell of the ordinary size in use on such engines, and a steam whistle. When an engine in motion and approaching a turnpike, highway or town road crossing or private crossing where the view of such crossing is obstructed by embankment, trees, curve or other obstruction to view, upon the same line therewith, and in like manner where the road crosses any other traveled place, by bridge or otherwise, the engineer or person in charge thereof, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from such crossing, and ring such bell continuously until the engine passes the crossing.

Sec. 8855. Penalties for violation of preceding section.

Every engineer or person in charge of such engine who fails to comply with the provisions of the two preceding sections shall be personally liable to a penalty of not less than fifty nor more than one hundred dollars, to be recovered by civil action, at the suit of the state, in the court of common pleas of a county wherein there is such a crossing.

Sec. 8856. Liability of company.

The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person.